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No. 08-98

Supreme Court, U.S.
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In The

Supreme Court of the United States

AMY ROBERTSON, et vir,

Petitioners,

vs.

COUNTY OF VENTURA, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION BY RESPONDENTS COUNTY OF VENTURA, JODY KELLER, SGT. WAREHAM, SCOTT PETERSON, AND DONNA KUONEN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Should this Court review a Circuit's unpublished decision which granted qualified immunity to a social worker and three deputy sheriffs for their conduct during a child custody investigation, where there is no compelling reason and the Circuit's decision is not in conflict with other federal court decisions?

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PROCEDURAL BACKGROUND

On April 24, 2006, the United States District Court, Central District of California, granted respondents County of Ventura, Donna Kuonen, Deputy Jody Keller, Sgt. David Wareham, and Deputy Scott Peterson's ("respondents") motion for summary judgment. The respondents' motion for summary judgment was based on the grounds that the respondents' conduct during a child abuse investigation was protected by absolute immunity and, in addition, the individual respondents' conduct was protected by qualified immunity. The district court determined that, based on the evidence before the court, the respondents were entitled to absolute immunity for their conduct during the investigation.

The petitioners filed an appeal with the Ninth Circuit Court of Appeals. After the appeal was filed, but before the oral argument before the Ninth Circuit, the Ninth Circuit issued its decision in *Beltran v. Santa Clara County*, 514 F.3d 906 (9th Cir. 2008). *Beltran* overruled a portion of a prior Ninth Circuit decision, *Doe v. Lebbos*, 348 F.3d 820 (9th Cir. 2003), which had held in part that social workers had absolute immunity from claims that they fabricated evidence during an investigation or had made false statements in a dependency petition. After the *Beltran* ruling was issued, the Ninth Circuit requested the petitioners and respondents in the instant case to file letter briefs to further address the issue as to whether the respondents were entitled to qualified immunity for their conduct.

On April 22, 2008, after oral argument, the Ninth Circuit affirmed the district court's granting of summary judgment. The Court of Appeals reviewed the district court's grant of absolute or qualified immunity de novo. *Botello v. Gammick*, 413 F.3d 971, 975 (9th Cir. 2005). The court affirmed summary judgment in favor of the County of Ventura as to the petitioners' *Monell* claim, holding that the petitioners did not put forth sufficient evidence in opposition to the motion for summary judgment to support their contention that the County had "ratified" the employees' actions, as required by *Gillette v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992). The court found that the district court had properly granted summary judgment in favor of social worker Donna Kuonen because she was entitled to absolute immunity for her actions related to the decision to initiate the detention hearing by filing the petition and detention report, citing *Beltran, supra*, at 908. The court further found that social worker Kuonen and the deputy sheriffs were entitled to qualified immunity under *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) [*en banc*].

Basically, the Ninth Circuit held that the petitioners made no showing in the trial court that respondents Wareham and Peterson violated any of the Robertsons' established rights, nor was there any showing that respondents Kuonen and Keller violated any constitutional rights of which a reasonable person would have known. Accordingly, the Ninth Circuit affirmed the district court's granting of summary judgment.

REASONS FOR DENYING THE PETITION

Petitioners' petition for a writ of certiorari misstates the facts in this case and continues to assert allegations as "facts" even though the petitioners did not provide any evidence in the trial court to support their allegations.

Respondents respectfully request that the Court deny the petition and leave in place the judgment of the Ninth Circuit, which correctly held that the respondents were entitled to qualified immunity for their conduct in this case. Further, as set forth below, the Ninth Circuit's decision was consistent with case law from other circuits.

FACTS OF THE CASE

A. The Respondents Conducted a Thorough and Diligent Child Abuse Investigation

The following is a summary of the thorough and diligent investigation conducted by the social worker and deputy sheriffs in this case.

On February 24, 2004, Ryder Robertson, age eight months, was taken to Los Robles Regional Medical Center by his parents, Amy and Curtis Robertson. A nurse noticed a large, tense bulge in the anterior fontanel of Ryder's skull. A CT head scan showed that Ryder was suffering from bilateral acute and subacute hematomas that were putting pressure on his brain. Ryder was transferred to Cedars-Sinai Medical Center. The CT scans were reviewed by Cedars-Sinai pediatrician Harold

Amer, M.D., and pediatric neurosurgeon Moise Danielpour, M.D. Dr. Danielpour performed an emergency bilateral craniotomy.

After the surgery was performed, Dr. Danielpour asked Kenneth Wright, M.D., a pediatric ophthalmologist, to conduct an ophthalmological examination on Ryder. Dr. Wright's colleague, Lizbeth Vicencio-Regner, M.D., examined Ryder's eyes using an ophthalmoscope and found bilateral preretinal and retinal hemorrhages. Dr. Wright confirmed that there were bilateral preretinal and retinal hemorrhages. Dr. Amer, Dr. Danielpour, and Dr. Wright formed the opinion that Ryder's symptoms were consistent with, and likely the result of, infantile shaking or shaken baby syndrome. Dr. Amer was of the opinion that the subdural hematomas were the result of two traumatic incidents, one within the past week and another a minimum of three weeks old.

On February 26, 2004, a social worker at Cedars-Sinai contacted the Ventura County Department of Children and Family Services and made a suspected child abuse report. Ms. Kuonen, Nurse Mayernik, and Deputy Keller met with the Cedars-Sinai social worker, who informed them that Ryder's treating doctors and an ophthalmologist had indicated that Ryder's symptoms were consistent with shaken baby syndrome. Deputy Keller, Ms. Kuonen, and Nurse Mayernik conducted in-depth interviews with Amy Robertson and Curtis Robertson and discussed Ryder's medical, developmental, and child care history in extensive detail. The Robertsons stated that Ryder had been solely in the care of either Amy Robertson, Curtis Robertson, or a daycare provider since approximately January 30, 2004. The

Robertsons denied that Ryder had any falls or accidents that might have caused his injuries while the child was in their care.

Deputy Keller then interviewed Dr. Wright in detail about Ryder's injuries. Dr. Wright informed Deputy Keller that the retinal hemorrhaging observed in Ryder was virtually always caused by shaken baby or battered child syndrome and that this was based on his own training and experience and was also well documented in virtually every textbook on pediatric ophthalmology.

Dr. Amer informed Deputy Keller and Ms. Kuonen that Ryder had suffered two intracranial injuries, one which was a minimum of three weeks old and one which had occurred within the past seven days. Ms. Kuonen requested that Dr. Amer provide a medical report to the Ventura County Children and Family Services Agency.

On March 1, 2004, Deputy Keller interviewed the daycare provider, who could not provide any information as to how Ryder had been injured. However, she stated that Curtis Robertson told her that he had been in "anger management classes." Deputy Keller interviewed and obtained records from Ryder's primary care pediatrician, William Bocash, M.D. She again spoke to Amy Robertson and discussed with her the fact that her husband, Curtis, had been in anger management classes and that there had been a domestic abuse incident involving the parents in November, 2003.

On March 3, 2004, Dr. Amer provided a medical report to the Ventura County Children and Family Services. The report stated that the constellation of findings was most consistent with trauma as one sees with infantile shaking, and the subdural hematomas indicated at least two traumatic occurrences, one probably less than one week old and one probably more than two to three weeks old.

On March 3, 2004, Senior Deputy Scott Peterson and Deputy Keller met with Amy and Curtis Robertson. Deputy Peterson asked the Robertsons to make a pretext call to the daycare provider. A pretext call is one in which one party, either a parent or a victim, will make a monitored and tape-recorded phone call to another party, a possible suspect, for the purpose of asking the suspect specific questions to see if the suspect's answers contradict what she either previously had told or subsequently tells investigators. Pretext calls are common investigatory procedures in child abuse cases. However, the Robertsons refused to do the pretext call and expressed concern that the pretext call might implicate themselves.

On March 3, 2004, Ms. Kuonen believed that it was necessary to file a California Welfare and Institutions Code Section 300 petition for detention of the child because (1) the child had sustained serious, life-threatening head injuries; (2) medical experts at Cedars-Sinai had opined that his injuries were consistent with infantile shaking; (3) the child's parents and daycare person could not provide any explanation regarding trauma or accidents which might account for the child's injuries, and they could not be ruled out as the person(s)

causing the injuries; and (4) the child was in danger of future injury or death if he was returned to the parents.

The Section 300 petition and detention report was filed with the juvenile court on March 8, 2004. The purpose of the detention report was to provide the juvenile court judge with information regarding the investigation, medical history, parent history, letter of detriment, and an individual health care plan to enable the judge to review the case and determine whether a prima facie case existed to temporarily place the child's care with the Human Services Agency pending disposition or further order of the court. Ms. Kuonen gave the parents notice of the detention hearing and provided them with dependency court and right-to-counsel information.

On March 8, 2004, Sgt. Wareham called the Robertsons and requested that they come to the sheriff's station. At the sheriff's station, the Robertsons submitted to two voice stress analysis (VSA) tests. The VSA tests showed that Amy Robertson was not deceptive but that Curtis Robertson was deceptive on certain questions. Curtis Robertson was given a third test, and the results again showed that he was being deceptive. The Robertsons were advised of the test results.

A detention hearing was held on March 10, 2004. The parents and their attorneys appeared in court. The Ventura County Superior Court judge found that there was prima facie evidence to support continued detention of the child and that temporary placement and care was vested with the Human Services Agency pending disposition or further order of the court.

On March 11, 2004, Ryder was discharged from the hospital and was placed with a licensed foster parent for one day. The Human Services Agency conducted an expedited relative approval which permitted Ryder to be placed in the care and custody of his maternal grandfather, Homer Caston, and Mr. Caston's wife, Helen Caston, the next day.

On March 15, 2004, Neal Kaufman, M.D., the head of the Cedars-Sinai Suspected Child Abuse and Neglect Team, also sent a letter to the County of Ventura. Dr. Kaufman's letter stated, among other things, that the consensus of the doctors caring for Ryder Robertson at Cedars-Sinai Medical Center was that his signs, symptoms, and evaluation were most compatible with shaken baby syndrome which occurred about one to six weeks prior to his admission to Cedars-Sinai. The letter also stated that the acute bleed could have been caused by a second injury within one week prior to admission, although it could have resulted from a very minor trauma in the context of the existing subdural hematoma.

From March 12, 2004, until August 16, 2004, Ryder was in the Castons' care. While Ryder was in the care of the Castons, the petitioners saw and interacted with their child virtually every day. The Superior Court returned custody to the parents on August 16, 2004. The detention of Ryder Robertson from March 11, 2004, through August 16, 2004, was pursuant to a lawful Superior Court order.

In their opposition to respondents' motion for summary judgment, the petitioners failed to provide any factual support for their conspiracy, false report, and

inadequate investigation allegations and failed to establish any genuine issue of fact in this case.

B. The Ninth Circuit's Holding Is Consistent with Other Circuits

The Second Circuit had previously granted qualified immunity in a case involving factual circumstances similar to the instant case. In *Van Emrik v. Chemung County Department of Social Services*, 911 F.2d 863 (2d Cir. 1990), the parents of a child who was a suspected abuse victim and who was temporarily taken from the parents' custody filed an action against child protective services caseworkers and the county Department of Social Services, alleging violation of their custody rights. The Van Emriks had taken their child to an emergency room at a local hospital. At the hospital, the child was diagnosed as suffering from a spiral fracture of the right leg.

The parents suspected that a babysitter had inflicted the injury. The emergency room physician told the mother that a child abuse report would be made. The child abuse report stated that the parents had no explanation for the injury but also indicated that the babysitter may have been responsible. A physician expressed the opinion that the nature of the injury was a "very suspicious" indication of child abuse. Another physician opined that the injury would require a significant amount of energy, though it could have occurred from an accidental fall. *Van Emrik*, 911 F.2d at 864-865.

A social worker concluded that, with the cause of injury unascertained, the child could be in danger if returned home, and decided to file a petition under the New York Family Court Act. The judge signed an order temporarily placing the child in the custody of the department. Ultimately, an investigation was conducted which ended without any determination of who was responsible for the injury. *Van Emrik* at 865.

The *Van Emrik* court noted that the individual defendants enjoyed qualified immunity from liability for damages if, at the time of the pertinent episode, it was not clear that the actions they took violated established constitutional rights or if it was objectively reasonable for them to believe that their actions did not violate such rights as were then clearly established. After reviewing the facts, the court concluded that the individual defendants were entitled to the defense of qualified immunity:

> Though a decision to remove a child from parental custody implicates the constitutional rights of the parents, it obliges protective services caseworkers to choose between difficult alternatives in the context of suspected child abuse. If they err in interrupting parental custody, they may be accused of infringing the parents' constitutional rights. If they err in not removing the child, they risk injury to the child and may be accused of infringing the child's rights. It is precisely the function of qualified immunity to protect state officials in choosing between such alternatives, provided that there is an objectively reasonable basis for their decision,

> whichever way they make it. Such a basis existed in this case.

Van Emrik, 911 F.2d at 866.

The *Van Emrik* defendants were confronted with an infant who had suffered an injury characterized by an attending physician as "very suspicious" of child abuse. Inquiry of the people possibly responsible, the parents and the babysitter, failed to discover how the injury was sustained. The defendants consulted with superiors and obtained a court order. The court held that the issue was not whether it was absolutely essential to remove the child or whether a more sensitive course might have been to leave the child hospitalized pending further investigation. Rather, *"[t]he issue is whether it was objectively reasonable for the defendants to make the decision they made, and no rational jury could find that it was not."* *Van Emrik*, 911 F.2d at 866 [emphasis added].

The analysis of the *Van Emrik* court in granting qualified immunity applies to the instant case. In fact, the granting of qualified immunity in the instant case is even more justified. Here, the County respondents were confronted with an infant who had suffered subdural hematomas and bilateral retinal hemorrhaging. They were told by Dr. Wright that the injuries were virtually certain to have been caused by shaken baby syndrome and were told by Dr. Amer that the child had sustained two head injuries, one within the past week, and that they were consistent with infantile shaking.

In addition, the County respondents did much more than a "quick inquiry" of the incident and the

causes of the child's injuries. They did a very detailed and thorough investigation, conducting multiple interviews of the doctors, parents, and daycare person and obtaining medical records. The respondents determined that only three persons — the mother, father, and daycare person — had custody of the child during the period that the injury likely occurred. However, none of those three persons had an explanation for how the injury occurred and thus could not be ruled out as the person(s) responsible for the injury.

There is no evidence in this case that the individual respondents filed false reports or false affidavits. Petitioners had ample opportunity to produce evidence to support their allegations and did not do so. Petitioners are now simply repeating these false allegations, again without evidence. The district court properly granted summary judgment to the respondents, and the Ninth Circuit properly affirmed it.

The Ninth Circuit's decision granting qualified immunity to the County respondents is consistent with rulings in other circuits. See *Gomes v. Wood*, 451 F.3d 1122 (10th Cir. 2006). Under the facts of the instant case, it was objectively reasonable for the individual respondents to take the actions they did and to make the decisions they made, and they reasonably believed that their conduct was lawful. They are entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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